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No. 96-1898

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.,
Petitioner,
v.
AMERICAN BAR ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN BAR ASSOCIATION

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QUESTIONS PRESENTED

1. Whether the courts below properly held that respondent American Bar Association was entitled to summary judgment dismissing petitioner's claim under 15 U.S.C. §§ 1-2 where (a) petitioner sought to hold respondent liable for alleged injuries caused by the actions of the states applying their own bar admission rules, (b) petitioner sought to hold respondent liable for an alleged "stigma" incidental to respondent's successful efforts to influence state bar admission decisions, and (c) petitioner failed to raise a genuine issue of material fact relating to the additional direct injuries allegedly caused by respondent?

2. Whether the court of appeals properly held (a) that the district court did not abuse its discretion in denying petitioner certain discovery that was not material to the grounds on which the court entered summary judgment, and (b) that the district court did not abuse its discretion in partially disqualifying three of petitioner's faculty members from performing certain functions as counsel for petitioner?

LIST OF PARTIES AND AFFILIATES

The caption of the case in this Court and the list on page ii of the petition contain the names of all parties. Respondent American Bar Association is a not-for-profit corporation organized under the law of Illinois. Pursuant to S. Ct. Rule 29.6, the American Bar Association states that it has no parent or subsidiary companies.

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BRIEF IN OPPOSITION OF RESPONDENT AMERICAN BAR ASSOCIATION

Respondent American Bar Association ("ABA") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Massachusetts School of Law at Andover, Inc. ("MSL"). The petition should be denied for the following reasons: (1) the decision of the court of appeals does not conflict with any decision of this Court or other courts of appeals and, in any event, is entirely correct; and (2) the petition rests on mere disagreements with the lower courts' conclusion that petitioner failed to raise a genuine issue of material fact relating to its claims and on the courts' alleged misapplication of properly stated rules of law to the factual record.

COUNTERSTATEMENT OF THE CASE

1. The ABA is a non-profit professional organization of attorneys whose membership is open to members of the bar of the 50 states and the territories of the United States, including graduates of law schools not accredited by the ABA. (Pet. App. 5A-7A; C.A. App. 1338, 3377.) Legal education and bar admissions have been a central concern of the ABA since its founding in 1878. (Pet. App. 6A; C.A. App. 2957-58.) Under the direction of Elihu Root, Chair of the ABA Section of Legal Education and Admissions to the Bar (the "Section") during 1920-22, the ABA first developed a set of accreditation standards establishing minimum criteria for programs of legal education. (Pet. App. 6A; C.A. App. 49, 2957-58.)

Since that time, the ABA has petitioned the highest court in each state to rely on ABA accreditation decisions in connection with bar admission decisions, and it continues regularly to communicate its opinions concerning accreditation and bar admission matters to the states. (Pet. App. 6A; C.A. App. 2958, 3618-19, 3623-53.) For example, the ABA informs state supreme courts and state boards of bar examiners of its accreditation decisions and annually sends them a list of all law schools accredited by the ABA. (Pet. App. 6A; C.A. App. 3618-19.) As a result of these efforts, under the bar admission rules of all 50 states and the District of Columbia, graduation from an ABA-accredited law school satisfies the legal education requirement for admission to the bar. (Pet. App. 6A; *see also* C.A. App. 1396-1409.)[1]

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[1] In addition, the Council of the Section has been recognized since 1952 by the U.S. Secretary of Education and his predecessors "as the national agency for accreditation of professional schools of law" and a "reliable authority" concerning the quality of legal education. (Pet. App. 6A; C.A. App. 3378.)

Numerous states recognize other ways of satisfying the legal education requirement for bar admission, and an individual applicant or law school can, in each state, petition for revision or waiver of state bar admission rules. (*See* Pet. App. 6A-7A; C.A. App. 1396-1409.) For example, the New Hampshire Supreme Court and the Maine Supreme Judicial Court have granted petitions filed by MSL to allow its graduates to take the bar examination in those states, even though the courts' rules require bar applicants to graduate from an ABA-accredited law school. (Pet. App. 7A; C.A. App. 3168; *In re Massachusetts School of Law*, Docket No. SJC-230 (Me. Dec. 24, 1996). In addition, petitions allowing individual MSL graduates to take the bar examination have been granted in the District of Columbia and Maryland. (Pet. App. 7A; C.A. App. 3484.) All told, MSL graduates can take the bar examination immediately after graduation in California, Maine, Massachusetts, New Hampshire, Vermont, and West Virginia and, in 12 other states, after practicing for a prescribed period in another jurisdiction. (Pet. App. 7A; C.A. App. 3483-84.)

2. Accreditation by the ABA is voluntary and open to any law school that submits an application to the ABA. (Pet. App. 7A; C.A. App. 3378.) The ABA grants provisional accreditation to applicant law schools that substantially comply with the ABA's accreditation standards and give assurance that they will be in full compliance within three years. (Pet. App. 7A; C.A. App. 845.) During the time period relevant to this case, there were 177 ABA-accredited law schools in the United States, as well as over 50 schools, including MSL, that were not ABA-accredited but had received some form of approval from individual states. (Pet. App. 6A.)

3. MSL conducted its first classes in 1988. (*Id.* at 5A; C.A. App. 917.) In May 1990, MSL received authority from the Board of Regents of the Commonwealth

of Massachusetts to award the *juris doctor* to its graduates. (C.A. App. 2.) That authority enables MSL's graduates to take the bar examination in Massachusetts and several other states. (C.A. App. 12-13; 3483.)

MSL applied to the ABA for accreditation in the fall of 1992 and early 1993. (Pet. App. 9A.) In connection with its application, MSL demanded that the ABA grant a wholesale waiver relieving MSL from complying with the ABA's accreditation standards. (*Id.* at 9A-10A; C.A. App. 845-47, 4065.) In a letter to MSL's trustees written shortly before submitting its application, MSL's dean outlined his strategy to gain accreditation without complying with the ABA's accreditation standards. (C.A. App. 3441-58.) In that letter, the dean set forth his conviction that if the ABA "is given reason to believe it is facing a tiger, it will seek to quickly come to a reasonable accommodation with MSL—it will probably, in fact, give way to most or all of our views." (*Id.* at 3452-53.)

MSL's strategy was premised on the dean's belief that the ABA would be financially vulnerable to a sustained, expensive litigation attack:

> Perhaps the most important fact I learned at the ABA convention in Dallas is this: The ABA ran a deficit of two million dollars last year, and is in desperation about insufficient revenues. . . .
>
> The ABA's financial straits are crucially important because . . . the lawyers needed to defend serious lawsuits cost a small fortune. The ABA will not want and cannot afford the heavy fees it would have to spend to defend against a suit by MSL. The ABA's counsel . . . will advise the ABA to expect to have to fund a war if MSL sues . . . . Given the financial straits the ABA is in, I do not believe it will want any part of this.

(*Id.* at 3456.) By August 1994, after only six years in operation, MSL had amassed a war chest—through annual surpluses funded out of tuition paid by MSL students—of

approximately $7 million to fund its litigation with the ABA. (C.A. App. 1203-04.)

The ABA considered MSL's application for accreditation in accordance with the ABA's established procedures. (*See* Pet. App. 10A.) Pursuant to these procedures, the ABA conducted a site evaluation of MSL, and MSL submitted extensive information to the ABA in support of its application including, among other things, written responses to the site evaluation report and the recommendations of the Accreditation Committee and the Council of the Section. (C.A. App. 50-51, 693-792, 905-06, 911-91.) In addition, representatives of MSL appeared before the Accreditation Committee, the Council and the House of Delegates. (C.A. App. 50-51, 837-38, 905-06, 3385.) Ultimately, the ABA denied MSL's application based on MSL's failure to comply with the ABA's accreditation standards in eleven substantive respects. (*See* C.A. App. 45-47, 845-46, 905-09, 3385.)

MSL commenced this action on November 23, 1993, alleging that defendants violated Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1-2. (C.A. App. 24-25.) After an extended period of discovery during which MSL took 32 depositions and respondents produced over 70,000 pages of documents, *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206 at 2 (E.D. Pa. July 29, 1996), the ABA filed a motion for summary judgment seeking dismissal of MSL's claims.[2]

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[2] While the ABA's summary judgment motion was pending, MSL filed a second lawsuit in Massachusetts state court asserting claims for breach of contract, misrepresentation and unfair trade practices against the ABA, AALS and 14 individuals, including 12 of the defendants in this action. That lawsuit, which also arose out of the ABA's denial of MSL's application for accreditation, was subsequently removed to the United States District Court for the District of Massachusetts. Earlier this year, the court entered summary judgment dismissing MSL's claims against all defendants. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No.

On August 30, 1996, the district court entered summary judgment dismissing MSL's claims. (Pet. App. 43A-66A.)[3] The court held, based on *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and the record evidence, that MSL failed to establish that it had suffered a cognizable antitrust injury. (Pet. App. 47A-65A.)

The court of appeals unanimously affirmed, concluding, as the district court had found, that "MSL has failed to demonstrate an injury for which antitrust liability may lie, ..." (Pet. App. 35A.) Specifically, the court held that MSL could not, as a matter of law, recover damages for any of the three types of injury that it alleged were caused by the ABA's actions. First, the court held that defendants were immune from antitrust liability for injury allegedly suffered as a result of decisions by the states that graduates of law schools not accredited by the ABA may not be admitted to the bar. (*Id.* at 20A-24A.) Second, the court held that defendants could not be liable for an alleged "stigma" or "loss of prestige" arising from the ABA's decision to deny MSL's application for accreditation. The court held that the alleged injury was incidental to the ABA's efforts to petition the states in con-

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95-12320-MEL, 1997 U.S. Dist. LEXIS 7033 (D. Mass. May 8, 1997) (entering summary judgment for ABA and individual defendants); *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 95-12320-MEL, 1997 U.S. Dist. LEXIS 3430 (D. Mass. Mar. 3, 1997) (entering summary judgment for AALS).

[3] The individual defendants named in the complaint had previously been dismissed by the district court for lack of personal jurisdiction. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374 (E.D. Pa. 1994). The other defendant organizations, the Association of American Law Schools, Inc. ("AALS") and the Law School Admission Council and Law School Admission Services, Inc. ("LSAC/LSAS"), moved for summary judgment as well. Upon entering summary judgment in favor of all defendants, the court dismissed the separate motions filed by AALS and LSAC/LSAS as moot. (Pet. App. 66A.)

nection with bar admission decisions. (*Id.* at 24A-28A.) Third, the court held that MSL had failed to come forward with evidence sufficient to raise a genuine issue of material fact that it had been injured by enforcement of ABA accreditation standards concerning faculty salaries, transfer credits, and admission into post-J.D. degree programs. (*Id.* at 28A-33A.) The court of appeals also found that the district court did not abuse its discretion in its discovery rulings or in its order disqualifying certain MSL faculty members from acting as trial counsel, giving oral argument, and taking depositions. (*Id.* at 14A-18A, 41A-42A.)

REASONS FOR DENYING THE PETITION

Contrary to MSL's assertion that the decision of the court of appeals "establishes a sweeping new antitrust immunity" (Pet. 13), the court simply applied well-settled principles of law to the unique facts of this case. The primary injury for which MSL sought recovery in the district court was an alleged loss of enrollment and tuition income due to the inability of its graduates to take the bar examination in particular states. (*See* C.A. App. 2, 12-14, 15-17, 19, 20, 22-24.) The decision of the court of appeals that the ABA cannot be held liable for bar admission decisions made by the states creates no conflict with the decisions of this Court or other courts of appeals.

In addition to this primary alleged injury, MSL offered alternative theories of recovery during the course of the litigation. Under its second theory, MSL sought to recover damages for an alleged "stigma" arising from the ABA's decision to deny MSL's application for accreditation. Once again, the decision of the court of appeals that the alleged "stigma" was incidental to the ABA's efforts to influence state bar admission decisions creates no conflict with the decisions of this Court or other courts of appeals.

Finally, MSL asserted late in the litigation that it had suffered direct injury as a result of the ABA's enforcement of its accreditation standards concerning faculty salaries, transfer credits and admission into post-J.D. degree programs. Both the district court and the court of appeals concluded that MSL failed to come forward with sufficient evidence to raise a genuine issue of material fact that it had been injured by those accreditation standards. MSL's mere disagreement with the factual determinations of the lower courts provides no basis for granting the petition.

1. MSL may not recover from the ABA for injury allegedly suffered as a result of the actions of the states. MSL seeks to hold the ABA liable for the decisions of state supreme courts that graduates of law schools not accredited by the ABA may not be admitted to the bar. As the court of appeals found (Pet. App. 20A), it is well established that each state possesses "the authority to decide what applicants may take its bar examination and may be admitted to the bar." *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) ("Pursuant to the State Constitution the Arizona Supreme Court has plenary authority to determine admissions to the bar").[4] It is similarly well settled that economic consequences flowing directly from restraints imposed by the operation of state law fall out-

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[4] *See also, e.g., In re Murphy*, 393 A.2d 369, 371, 374 (Pa. 1978) (authority over bar admission "exercised [] exclusively by the Supreme Court"), *cert. denied*, 440 U.S. 901 (1979); *In re Hansen*, 275 N.W.2d 790, 796 (Minn. 1978) ("We have not delegated our authority to the ABA but, instead, have simply made a rational decision to follow the standards of educational excellence it has developed"), *cert. denied*, 441 U.S. 938 (1979); *Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036, 1040 (D. N.J. 1975) (state's adoption of "the standards of an approving body does not support a conclusion that such adoption is an abrogation or delegation of the power or duty to supervise the practice of law in this State"), *aff'd*, 546 F.2d 418 (3d Cir. 1976).

side the scope of the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 352 (1943); *Hoover*, 466 U.S. at 573-74.

MSL may not circumvent this principle by suing private parties, such as the ABA, whose views have influenced the state action at issue. *Noerr*, 365 U.S. at 135-36; *United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965). As this Court observed in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383 (1991), "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government."

The decision of the court of appeals affirming dismissal of MSL's claims on this issue represents a straightforward application of well-settled law that is consistent with the decisions of other courts of appeals.[5] For example, in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 513 U.S. 813 (1994), the defendant convinced a private association to amend its code in such a way as to exclude use of the plaintiff competitor's product in those municipalities that relied on the code. The court held that the defendant was immune from antitrust liability because the plaintiff's alleged injuries "flowed directly from government action," even in those markets where the government had not

[5] *See also Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992) (holding ABA not liable for antitrust injury resulting from state supreme court's adoption of ethical standards developed by ABA), *cert. denied*, 510 U.S. 992 (1993); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F. Supp. 716, 722-23 (N.D. Ga. 1986) (holding accreditor immune from antitrust liability for injury arising from state decisions to deny licenses to graduates of unaccredited schools), *aff'd*, 813 F.2d 349 (11th Cir.), *cert. denied*, 484 U.S. 854 (1987). *See also Zavaletta v. American Bar Ass'n*, 721 F. Supp. 96 (E.D. Va. 1989) (dismissing antitrust claims of students at unaccredited law school based on *Noerr* doctrine).

adopted, but merely relied on, the code. *Id.* at 299. Conversely, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), on which MSL heavily relies (*see* Pet. 19-23), is inapposite because the Court explicitly excluded from consideration any injury resulting from government action. 486 U.S. at 498 n.2, 500.

As the court of appeals observed, MSL has identified no judicial authority supporting a conclusion to the contrary. (Pet. App. 22A-24A & n.8.) Nor did the U.S. Department of Justice, in its *amicus* brief filed in the court of appeals, question the lower court's holding on this issue. (Brief of *Amicus Curiae* United States at 9-10 (Oct. 28, 1996) (taking no "position on the district court's holding that MSL cannot recover for any injury it suffered as a result of state decisions to adopt ABA standards"), *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (No. 96-1792) [hereinafter ("Gov. Br.")].)

MSL's reliance on a line of cases holding that anticompetitive restraints directly imposed by private parties are not immunized by state authorization of that conduct is similarly unavailing. As the court of appeals observed, each of those cases involved private restraints of trade that were self-executing—independent of state law—and led directly to the alleged antitrust injury. (*See* Pet. App. 22A.)[6] In each of those cases, the Court rejected the

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[6] *See Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 627 (1992) (private price-fixing agreement); *Patrick v. Burget*, 486 U.S. 94, 105 (1988) (medical review board termination of competing doctor's staff privileges); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (price-fixing); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 581 n.3 (1976) (tying). The appellate decisions cited by MSL are to the same effect. *See Litton Systems, Inc. v. American Tel. and Tel. Co.*, 700 F.2d 785, 806-08, 814-16 (2d Cir. 1983) (predatory conduct); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 482, 484 (4th Cir. 1980) (concerted refusal to deal).

defendant's arguments that state authorization of the private anticompetitive conduct immunized the private actors.

Here, by contrast, it is the application by state supreme courts of state bar admission rules that caused the alleged injury about which MSL complains. (*See* Pet. App. 23A n.9 ("MSL continues to miss the crucial point that it is the direct action of the states which causes its injury").) MSL's arguments that the states have not authorized or supervised the ABA's accreditation activities are therefore beside the point because, as the Court stated in *Hoover*, "[w]here the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of clear 'articulation' and 'active supervision.' " 466 U.S. at 569. (*Accord* Pet. App. 21A ("Because the states are sovereign in imposing the bar admission requirements, the clear articulation and active supervision requirements urged by MSL are inapplicable"), 25A n.11 ("MSL seriously misstates the *Noerr* doctrine").)

2. MSL may not recover for an alleged "stigma" or "loss of prestige" arising from the ABA's denial of MSL's application for accreditation. Because the "stigmatic" injury alleged by MSL is incidental to the ABA's efforts to petition the states in connection with bar admission decisions, the court of appeals properly held that MSL's "stigma" claim is barred by *Noerr*.

In *Noerr*, the Court held that injuries "incidental" to legitimate efforts to influence government lie outside the reach of the Sherman Act, even where such efforts were made as part of a deceptive publicity campaign that had the purpose and effect of poisoning customer relationships. 365 U.S. at 142-44. The Court explained that it is "inevitable" that "an incidental effect" of such a campaign "may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed." *Id.* at 143. Allowing plaintiffs to recover for such injuries would "be tantamount to outlawing all such

campaigns," a result the Sherman Act was not intended to achieve. *Id.* at 143-44. The Court drew the line at particularized "attempt[s] to interfere directly with the business relationships of a competitor," concluding that the absence of any evidence "that the railroads attempted directly to persuade anyone not to deal with the truckers" was dispositive of the plaintiffs' antitrust claims. *Id.* at 142-44.

That same result follows here *a fortiori*. The court of appeals found, on the record before it, that for the past 70 years the ABA has "petitioned the states in a campaign to prohibit graduates from unaccredited schools from taking bar examinations." (Pet. App. 6A, 26A-27A. *See* C.A. App. 2958, 3618-19.) Indeed, MSL admitted in both the district court and the court of appeals that the ABA engaged in petitioning activity. (C.A. App. 128, 134-35, 139 (MSL motion to compel (Mar. 10, 1994)); Brief of MSL at 15-16, 51 (Oct. 21, 1996), *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (96-1792).) As part of this activity, the ABA communicates its accreditation decisions to the states, defends the criteria on which those decisions are based, and regularly opposes efforts to allow graduates of law schools not accredited by the ABA to take the bar examination. (Pet. App. 6A, 27A; C.A. App. 2958, 3618-19, 3623-53.) Moreover, the court of appeals found that there was no evidence that the ABA had attempted to persuade anyone not to deal with MSL. (Pet. App. 27A-28A.) Therefore, the court properly held that any "stigma" suffered by MSL was purely incidental to the ABA's legitimate petitioning activity.

This part of the decision of the court of appeals again represents a straightforward application of well-settled law. The decision does not create a conflict with other courts of appeals; as the court noted here, it is well-established that "loss of prestige resulting from a refusal to approve

a product or service does not alone make out an antitrust claim" (Pet. App. 26A).[7] Nor did the Department of Justice disagree with this holding in the court of appeals; indeed, in its amicus brief filed in the court of appeals, the Government recognized that "[a]ntitrust defendants are not liable for any anticompetitive effects of legitimate petitioning efforts, even if those efforts have an incidental or derivative effect on private market behavior because, to construe the Sherman Act otherwise, would unduly chill important First Amendment activities." (Gov. Br. at 11-12.)

MSL does not challenge this legal standard, but rather disagrees with the court's application of that standard to the unique facts of this case. Once again, MSL relies heavily on *Allied Tube*, which the court of appeals properly found to be inapposite. In *Allied Tube*, this Court concluded that the actions of a group of manufacturers to exclude the plaintiff competitor's product from the National Electric Code constituted an anticompetitive agreement among manufacturers, distributors and consumers not to trade in the plaintiff's product. 486 U.S. at 507. Cautioning that its holding represented a "close" question grounded in the specific "context and nature" of the activity at issue, the Court found that the defendant's actions constituted "anticompetitive commercial activity" that had a market impact independent of any

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[7] *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251-52 (7th Cir. 1994) (rejecting antitrust claim for damages caused by defendant's failure to certify plaintiff doctors), *cert. denied*, 116 S. Ct. 1044 (1996); *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (rejecting antitrust claim for damages caused by the defendant's failure to approve plaintiffs' medical procedure); *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988) (rejecting antitrust claim for damages caused by trade association's unjustified denial of request for product certification). *See also Sessions Tank*, 17 F.3d at 299 (stating antitrust immunity attached to alleged injury incidental to valid petitioning activity).

petitioning activity and was therefore not immune under *Noerr*. *Id.* at 507 & n.10.

By contrast, MSL's alleged injury arose from the ABA's communication of its accreditation decisions to the states and the public, which is precisely the speech protected under *Noerr*. Based on the factual record before it, the court of appeals distinguished *Allied Tube*, finding that there was no evidence that the ABA had attempted to interfere with MSL's commercial relationships and concluding that the ABA's communication of its accreditation decisions was not "commercial activity" and did not involve an anticompetitive restraint of trade. (Pet. App. 25A-26A.) MSL's disagreement with the factual determinations of the court of appeals provides no basis for review by this Court.

3. The court of appeals properly affirmed the trial court's dismissal of MSL's claims that it suffered direct injury caused by the ABA's accreditation standards relating to faculty salaries, the acceptance of transfer credits earned at law schools not accredited by the ABA, and the admission into post-J.D. programs of graduates of unaccredited law schools. Contrary to MSL's hyperbolic assertions, however, the decision of the court of appeals was based, not on a "sweeping new antitrust immunity for price fixing agreements, boycotts and other anticompetitive actions" (*see* Pet. 13, 15, 22, 26, 29), but rather on the court's conclusion that MSL had failed to come forward with evidence to raise a genuine issue of material fact that it had been injured by those accreditation standards (Pet. App. 28A-33A).

MSL's assertion that the court's decision "amounts, for practical purposes, to *virtual per se immunity*" for the ABA (Pet. 15 (original emphasis)), is refuted by the plain language of the court's opinion. Indeed, the court of appeals explicitly recognized that, "[a]lthough the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have

graduated from an ABA-accredited law school and from any stigma injury resulting from the denial of accreditation under the *Noerr* petitioning doctrine, the ABA is not immune in the actual enforcement of its standards." (Pet. App. 28A-29A.)

Both the district court and the court of appeals simply found that there was no evidence to support MSL's assertions of injury. (Pet. App. 29A-33A, 51A n.36, 62A n.46.) First, the court of appeals found that the ABA did not base its denial of MSL's application for accreditation on the level of faculty salaries paid by MSL. (Pet. App. 29A.)[8] Second, relying on MSL's own admissions, the court found that MSL had not raised its faculty salaries in an attempt to comply with the ABA's accreditation standards. (*Id.* at 30A-31A.) Third, the court found that the ABA's accreditation standards had not raised salary levels in the market from which MSL hired its faculty. (*Id.* at 31A-33A.) Finally, the court found that MSL had not suffered any injury as a result of an alleged boycott by the ABA. (*Id.* at 33A & n.18.) MSL's disagreement with the factual determinations of the court of appeals and the trial court, based in large part on MSL's own admissions (*see, e.g., id.* at 30A-31A, 33A n.18), does not provide a basis for granting its petition.[9]

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[8] MSL's assertion that the decision of the court of appeals leaves the ABA free to fix the level of salaries paid to law faculty (*see, e.g.*, Pet. i, 16 n.10) is simply wrong. In February 1995, the ABA rescinded its accreditation standards that addressed faculty salaries and subsequently agreed, in a consent decree entered into with the Department of Justice, that it would not adopt standards relating to faculty salaries for a period of 10 years. *United States v. American Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996).

[9] In support of its position, MSL repeatedly refers and cites to allegations made by the Department of Justice in its litigation with the ABA. (*See, e.g.*, Pet. 2-9, 11-12, 14-15.) As the court of appeals observed, MSL's reliance on such allegations is misplaced because the Government has never alleged—in that litigation or in the court of appeals—that MSL was injured by the ABA's actions and because the Government's allegations were never proven and thus

4. MSL's remaining allegations are inherently unworthy of review by this Court. First, MSL was allowed broad discovery relating to the grounds on which the district court entered summary judgment. Indeed, under the district court's discovery rulings, *see, e.g., Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837 (E.D. Pa. 1994), MSL took 32 depositions and defendants produced over 70,000 pages of documents, including all documents relating to the ABA's consideration and denial of MSL's application for accreditation. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206 at 2 (E.D. Pa. July 29, 1996). MSL's assertion that "the district judge ruled the ABA had not fixed salaries" and used this ruling to curtail discovery (Pet. 8-9) misrepresents the district court's discovery rulings, as the court of appeals itself noted (Pet. App. 14A-15A).

Similarly, contrary to its assertions (Pet. 5, 28), MSL had the full opportunity to take discovery relating to the ABA's *Noerr* defense and MSL's state-action arguments, *see Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. (E.D. Pa. May 16, 1996) (granting MSL motion to compel), but completely failed to do so—as the district court itself pointed out, *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. at 2-3 (July 29, 1996). To the extent MSL complains of needing additional discovery in an attempt to deconstruct state bar admission decisions to determine the impact of ABA accreditation opinions, such an "inquiry runs afoul of the principles guiding the *Parker* and *Noerr* doctrines." *Sessions Tank*, 17 F.3d at 300. *See also Omni Outdoor Advertising*, 499

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cannot be taken as true. (Pet. App. 33A n.19.) *Accord United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995). *See also* 15 U.S.C. § 16(h) (consent decree proceedings "shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws").

U.S. at 377-79, 383 (rejecting "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns"); *Hoover*, 466 U.S. at 579-80 & n.34 (rejecting attempt to "look behind" state bar admission decisions).

Finally, MSL's suggestion that it was somehow prejudiced by the district court's order partially disqualifying three MSL faculty members from performing certain functions as counsel (Pet. 9, 28) is frivolous. First, MSL did not allege in the court of appeals that it received incompetent counsel. (Pet. App. 42A.) Second, MSL did in fact retain experienced antitrust counsel.[10] Third, the district court's order was limited in scope and prohibited the relevant individuals only from acting as trial counsel, giving oral argument and deposing witnesses; the district court did not prohibit these individuals from engaging in legal research, formulating discovery, writing briefs, or otherwise using their antitrust expertise on petitioner's behalf. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. (E.D. Pa. Mar. 17, 1994).

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[10] As the district court noted, "[t]he complaint was signed by Harold Kohn, one of America's premier antitrust litigators whose experience includes arguing the seminal antitrust case of [*Noerr*]." *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. at 1 (E.D. Pa. July 29, 1996). In total, MSL retained seven different firms at various times in the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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